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Supreme Court, U. S.
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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 22[redacted]485

GEORGE CORNELIUS MOORE and LESTER HAUGHTON,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF OF THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND FOR STAY OF EXECUTION OF JUDGMENT

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BRIEF OF THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND FOR STAY OF EXECUTION OF JUDGMENT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This is an application by the petitioners, George Cornelius Moore and Lester Haughton, for a *writ of certiorari* to review the decision of the Court of Appeals of the State of New York, rendered on the 21st day of November 1947, unanimously affirming a judgment of the County Court of the County of Bronx, in the State of New York, convicting the petitioners of the crime of Murder in the First Degree.

Facts

On December 18, 1946, Detective James M. Burke, of the Police Force of the City of New York, was assigned, by his superior officer, to do police duty in a licensed package liquor store at premises 1439 Webster Avenue, in the County of Bronx, City and State of New York. He arrived there about 5.15 P. M., and seated himself behind some cases, in the rear of the store, which was used as a storeroom.

At that time, one Richard Shaw, husband of the owner of the store, was the only other person there.

The two petitioners, George Cornelius Moore and Lester Haughton, pursuant to a plan, formed earlier in the day, to commit a robbery there, came into the store about 6 P. M. Moore had a 45-calibre automatic gun with him, which he had obtained from one Otis Banks, that afternoon.

Shaw walked towards them, believing them to be customers. Moore ordered Shaw to get in the back, and drew his gun. As Shaw was walking to the rear of the store, and got close to the boxes in the rear, Detective Burke stepped out from behind the boxes. Moore made a lunge for Burke and they both grappled. Shaw then got behind a counter and "ducked".

Shaw heard six or seven shots fired. After the shooting, he came from behind the counter, at which time the petitioners Moore and Haughton had already left the store. Shaw saw Burke slumped over some boxes, and noticed a wound on top of Burke's head. He notified the police. An ambulance surgeon arrived at about 6.15 P. M. He found Burke slumped over some cases of liquor, in a considerable amount of blood, and pronounced him dead.

After the shooting, the petitioners ran from the store and, by separate routes, returned to Harlem, in the County, City and State of New York, from which place they had started. During the course of their flight, Moore gave the fatal gun to Haughton.

There was ballistic testimony which identified this gun as the fatal gun.

After Moore's return to Harlem, he sent for one Adolph Clark, who knew that Moore and Haughton had gone to the Bronx to commit a robbery. When he arrived at Moore's home, Clark was informed, by Moore, that he had been shot in the arm and that he thought he had killed a man. He asked Clark to see one Joe Brown, in order to borrow some money for peroxide for his arm. Clark noticed two wounds on Moore's left arm. He took Moore's overcoat, jacket and sport shirt with him, at Moore's request. Brown and Clark made the purchase, and returned to Moore's home. Moore repeated what he had previously told Clark, about the shooting.

The following day, Banks went to Moore's home, and Moore told him about the shooting. Banks asked for the return of the gun, which he had given Moore the day before. Moore, at first, said that he had thrown it away, and asked Banks what he wanted with a "hot" gun. When Banks told Moore that the gun did not belong to him, Moore promised to get it back for him.

The testimony shows that Haughton, after getting the fatal gun from Moore, in the course of their flight, subsequently gave it to Adolph Clark, who kept it in his home until Sunday afternoon and then returned it to Otis Banks. The testimony also shows that the gun was fully loaded, when Banks gave it to Moore, and that it had been fully discharged, when Banks got it back.

On January 3rd or 4th, 1947, Banks left the fatal gun with one Frank Askew, as security for a loan of thirty dollars. The gun was recovered by the police, at Askew's home, on February 8, 1947, after both petitioners had been apprehended and had made full confessions.

Moore's clothes, which Clark had taken away with him, from Moore's home, on the night of the shooting, were subsequently burned by Adolph Clark and one Harold Dupree. To Dupree, Moore also stated that he had been shot in a hold-up in the Bronx, and that he had shot a policeman.

On February 7, 1947, Moore made a confession, in which he stated, in substance, that he and another man, whose name he said he did not know, were involved in the shooting and that this other man used the fatal gun.

Later that night, he changed his story, and identified the other man with him as the petitioner Haughton. He also admitted, in that later confession, that he, Moore, fired the fatal shots.

Between the first and second confessions, made by Moore, he was seated next to Shaw, in the office of Chief Assistant District Attorney Ryan, to whom the confessions were made. Before making the second confession, Moore addressed himself to Shaw, and told him that it was lucky for him, Shaw, that he did not use Shaw as a shield, when Burke began shooting, or he, Shaw, would probably have been killed also.

Haughton was apprehended on February 8, 1947, and, at first, denied any participation in the attempted robbery and in the killing of Detective Burke.

Shortly thereafter, he was confronted by his co-defendant Moore who said to him:

> "I have told everything. They got everything. Our friends spoke on us. * * * Everything is up. You might as well tell him what happened * * * " (fols. 1279-1280, Record on Appeal).

Whereupon, the petitioner Haughton admitted his connection with the crime, and also made a full confession.

The confessions made by Moore and Haughton were stenographically recorded, and were immediately transcribed. Each of the petitioners read his confession, and made corrections in their respective statements, which they were told they could do, if they so desired. Each of the petitioners then signed his name, at the bottom of his confession.

As to the petitioner Haughton, Clark testified that he and Haughton were in the Bronx about a week before the

shooting, and passed the liquor store in question; and that Haughton said to him that it looked like an easy store to stick up. When Haughton took the stand, on his own behalf, he admitted that he and Clark had passed this store a week before, as testified to by Clark, but claimed that it was Clark's suggestion that the store was an easy store to stick up.

The petitioner Moore, at the time of the trial, was 34 years old, and the petitioner Haughton 24 years old.

Each of the petitioners, when testifying in his own behalf, admitted that he had previously been convicted of crimes.

Opinions of the State Courts

The petitioners Moore and Haughton were convicted of the crime of Murder in the First Degree, after a trial by a jury, in the County Court held in the County of Bronx, State of New York. No opinion was rendered by the Trial Court.

The judgment of conviction of the crime of Murder in the First Degree, as to each of the petitioners, was unanimously affirmed by the Court of Appeals of the State of New York, without opinion.

Preliminary Statement

On February 11, 1947, the Grand Jury of Bronx County, State of New York, filed an indictment against the petitioners, Moore and Haughton, for the crime of Murder in the First Degree.

Thereafter, Counsel was duly assigned, to each of the petitioners.

On February 19, 1947, each of the petitioners pleaded not guilty to the said indictment.

Thereafter, a motion was made, by the People, in the County Court, Bronx County, for a special jury, pursuant to the provisions of section 749-aa of the Judiciary Law of the State of New York, to try the issues.

This motion was opposed by Counsel for each of the petitioners.

The motion was granted on February 26, 1947, and it was ordered that a panel of 150 special jurors be drawn on the 3rd day of March, 1947.

Such drawing was held and was supervised, as required by law, by a Justice of the Supreme Court of the State of New York.

Each of the petitioners was represented by Counsel at such drawing, and raised no objection, whatsoever, to the method of drawing.

On March 20, 1947, when the case was called for trial, each of the petitioners served a challenge to the panel of jurors, upon the following grounds:

1. That section 749-aa of the Judiciary Law of the State of New York is in violation of section I of the Fourteenth Amendment of the Constitution of the United States.

2. That qualified negro jurors were improperly excluded from the list of special jurors, from which said jury panel was drawn.

3. That qualified women jurors were improperly excluded from the list of special jurors, from which said jury panel was drawn.

The challenge came on to be heard, and the minutes of this hearing can be found at pages 36 to 48 inclusive of the record on appeal.

For the convenience of this Court, the minutes on this hearing are set forth in the appendix herein.

At the conclusion of the hearing, the challenge was disallowed, to which ruling the petitioners duly excepted.

Upon the appeal to the Court of Appeals, the petitioners did not, and they do not now, upon this application for a *writ of certiorari*, urge their third ground of challenge (alleged improper exclusion of women jurors).

After the challenge was disallowed, a jury was duly selected, and the petitioners tried on the indictment aforesaid. The jury returned a verdict of guilty of the crime of Murder in the First Degree, as to each petitioner.

The Court of Appeals of the State of New York, in unanimously affirming the judgment of conviction as to each petitioner, fixed the week beginning Monday, January 5, 1948, as the week during which the original sentence of death shall be executed upon the petitioners herein.

The Questions Presented

1. Whether the trial and conviction of the petitioners, by a special jury, pursuant to section 749-aa of the Judiciary Law of the State of New York, denied to petitioners their rights under the Fourteenth Amendment of the Constitution of the United States.

2. Whether there was a systematic, intentional and deliberate exclusion of negroes from the panel of jurors from which a trial jury was selected in the instant case.

Statute Involved

The relevant statute is set forth in the appendix herein.

POINT I

The trial and conviction of the petitioners for the commission of the crime of murder in the first degree, by a special jury, pursuant to section 749-aa of the Judiciary Law of the State of New York, did not deny to the petitioners their rights under the Fourteenth Amendment of the Constitution of the United States.

The petitioners contend that section 749-aa of the Judiciary Law of the State of New York is unconstitutional, in that it violates the Fourteenth Amendment of the Constitution of the United States.

The Court of Appeals of the State of New York, in the case of *People* v. *Dunn* (157 N. Y. 528), *People* v. *Hall* (169 N. Y. 184), *People* v. *Meyer* (162 N. Y. 257), and *People* v. *Conklin* (175 N. Y. 333), has held that the act of the Legislature in providing for special juries in criminal actions, in certain cases, is a valid and constitutional exercise of the Legislative power.

This Court, in the recent case of *Fay* v. *New York*, decided June 23, 1947 (U. S. Supreme Court, Law-ed. Advance Opinions 1946-1947, Vol. 91—No. 17), rehearing denied October 13, 1947, had the question of the constitutionality of section 749-aa of the Judiciary Law of the State of New York before it.

This Court held the statute (sec. 749-aa of the Judiciary Law of the State of New York) to be constitutional.

In the prevailing opinion, Mr. Justice JACKSON, at page 1523 said:

> "We fail to perceive on its face any constitutional offense in the statutory standards prescribed for the special panel. The Act does not exclude, or authorize the clerk to exclude, any person or class because of race, creed, color or occupation. It imposes no qualification of an economic nature beyond that imposed by the concededly valid general panel statute. Each of

the grounds of elimination is reasonably and closely related to the juror's suitability for the kind of service the special panel requires or to his fitness to judge the kind of cases for which it is most frequently utilized. Not all of the grounds of elimination would appear relevant to the issues of the present case. But we know of no right of defendants to have a specially constituted panel which would include all persons who might be fitted to hear their particular and unique case. This panel is for service in a wide variety of cases and its eliminations must be judged in that light. We cannot overlook that one of the features which has tended to discredit jury trials is interminable examination and rejection of prospective jurors. In a metropolis with notoriously congested court calendars we cannot find it constitutionally forbidden to set up administrative procedures in advance of trial to eliminate from the panel those who, in a large proportion of cases, would be rejected by the court after its time had been taken in examination to ascertain the disqualifications. Many of the standards of elimination which the clerk is directed to apply in choice of the panel are those the court would have to apply to excuse a juror on challenge for cause."

The petitioners, as contended in *Fay* v. *New York, supra,* contend that special juries are convicting juries, and refer to the fourth annual report of the Judicial Council of the State of New York (pp. 46-48) in support of that contention. Counsel for the petitioners further point to the result of their investigation of the records of convictions, in the County Court of Bronx County, to substantiate that claim. They assert that from July 1, 1937 to June 30, 1946, there were 79% of convictions by special juries, as compared with 57% of convictions by ordinary juries; that of the 19 cases tried by special juries, during that period there were 15 convictions and 4 acquittals.

Accepting the figures submitted by the petitioners, the respondent begs leave to point out that all of the cases in which special juries were used in Bronx County, from July 1, 1937 to June 30, 1946, were capital cases, with the exception of two. One of those two cases involved a manslaugh-

ter, arising out of an abortion; and the other, an involved case of criminally receiving stolen property, which took about three weeks to try.

In five of the above capital cases, in which verdicts of guilty were returned, the jury convicted of a lesser degree than that charged in the indictment.

So that, in nine of the nineteen cases tried, by special juries in Bronx County, the defendants were either acquitted or found guilty of lesser degrees of crime than that charged.

Surely, such a record does not support the contention of the petitioners that special juries are convicting juries.

The petitioners rely, heavily, on the annual reports of the Judicial Council of the State of New York in support of their contention.

Mr. Justice JACKSON, in his opinion, in *Fay* v. *New York*, *supra*, at page 1528, with reference to the reports of the Judicial Council, said as follows:

> "While the Judicial Council has pointed out and investigated the different conviction ratios, it has at no time suggested that the special jury has been inclined to convict except where conviction was warranted. New York extends an appeal on law and fact as matter of right. If there were a tendency to convict improperly, the Judicial Council, which includes the Chief Judge of the Court of Appeals and the Presiding Justice of the Appellate Division, which courts review these cases, would know it. Despite the Council's desire to abolish this jury, no such reasons were ever assigned. No statistics are produced to show that special juries have been more often reversed on the facts than ordinary ones. Of course, it would be impossible for us to say even were we to examine the cases in detail whether the difference in percentage of convictions indicated a too great readiness to convict on the part of special juries or a too great readiness to acquit on the part of ordinary juries, or whether the disparity reflected a difference between the ordinary case and those selected for special jury trial, rather than a reflection of an attitude on the part of either panel. It may result from the greater attention and better counsel which the prosecution gives to these important cases."

The respondent respectfully submits that statistics have little value in determining what the attitude of jurors has been in the past.

Ever so many factors determine whether a juror in a given case will return a verdict of guilty. Some of those factors are:

1. Sympathy plays a great part in the trial of a criminal case. Experience has shown that where the crime is of a serious nature, or is affected with a great public interest, sympathy is less likely to play a part in the jury's consideration of the case. It is that type of case which is generally tried by a special jury.

2. Important cases, such as are tried by special juries, receive greater attention from the police in their search for evidence, and more thorough preparation on the part of the prosecution.

It is common knowledge that only the ablest and most experienced prosecutors are assigned to the trial of important cases.

3. In the type of cases tried by special juries, material witnesses are taken into custody and committed, so as to be available at the trial.

This practice results in material evidence being available, and lessens the opportunity, of those interested in bringing about an acquittal of the defendant, to tamper with such witnesses.

In the trial of ordinary cases, by ordinary juries, this practice is rarely resorted to, because it would involve the commitment of a multitude of witnesses.

Since only such cases as involve crimes of a serious or involved nature, or are affected with a public interest have been tried by special juries in Bronx County, while ordinary, "run-of-the-mill' cases have been tried by ordinary juries, the difference in the percentage of convictions cannot be attributed to a "too great readiness to convict on

the part of special juries or to a too great readiness to acquit on the part of ordinary juries."

The disparity in the percentage of convictions, it is respectfully submitted, reflects a difference between the ordinary case and the important case selected for special jury trial.

Each case, it is submitted stands upon its own facts.

Notwithstanding the greater attention and more thorough preparation given to the trial of important cases, special juries acquit, or convict of a lesser degree of crime, where the evidence warrants it.

Thus, in Bronx County, from July 1, 1937 to June 30, 1946, special juries acquitted in four out of nineteen cases tried, and in five cases convicted of a lesser degree than that charged in the indictment.

It is respectfully submitted that the foregoing statistics do not support the contention of the petitioners that special juries are convicting juries.

POINT II

There was no systematic, intentional and deliberate exclusion of negroes from the panel of jurors from which the jury was selected in the instant case.

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. Virginia v. Rives, 100 U. S. 313, 322, 323, 25 L. ed. 667, 670, 671; Martin v. Texas, 200 U. S. 316, 320, 321, 50 L. ed. 497, 498, 499, 26 S. Ct. 338; Thomas v. Texas, 212 U. S. 278, 282, 53 L. ed. 512, 513, 29 S. Ct. 393; Smith v. Texas, 311 U. S. 128, 85 L. ed. 84, 61 S. Ct. 164; Hill v. Texas, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159; Akins v. Texas, 325 U. S. 398, 89 L. ed. 1692, 65 S. Ct. 1276, supra. Also, when discrimination of an unconstitu-

tional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. Tarrance v. Florida, 188 U. S. 519, 47 L. ed. 572, 23 S. Ct. 402; Martin v. Texas, 200 U. S. 316, 50 L. ed. 497, 26 S. Ct. 338; Norris v. Alabama, 294 U. S. 587, 79 L. ed. 1074, 55 S. Ct. 579; Snowden v. Hughes, 321 U. S. 1, 8, 9, 88 L. ed. 497, 502, 503, 64 S. Ct. 397; Akins v. Texas, 325 U. S. 398, 400, 89 L. ed. 1692, 1694, 65 S. Ct. 1276."

Fay v. *New York, supra*, 1530.

The evidence introduced by the petitioners to establish their ground of challenge that negroes were systematically, intentionally, and deliberately excluded from the panel of jurors, wholly fails to substantiate that claim.

The petitioners, upon the trial of the challenge, called one William F. Fischer, employed in the County Clerk's Office, Bronx, Division of Jurors Office, who supervised the compiling of the list of special jurors.

He testified that under the law he was required to prepare a list of 800 special jurors; that such list was made up from the list of regular jurors; that he could not tell, from the records, how many on the special jury list were negroes or whites, since no record was made as to color, race or creed, in the selection of special or regular jurors (fols. 123-142, Record on Appeal).

He testified that, because of that fact, he was unable to state how many negroes were on the special jury list, but said that he was certain that there were some.

Thus, his testimony on that point was as follows:

"Q. Mr. Fischer, of your own knowledge, you cannot then definitely state whether or not there are any Negro jurors on the special panel? A. Well, we know there are.

Q. When you say you know there are, do you know that from your records? A. Yes, sir; from examining them personally.

Q. How many would you say there are on the special list? A. I couldn't even give you an estimate, because there are so many of them that come in. I couldn't tell you truthfully.

Q. You mean there are so many people that come into your office? A. No; colored people that we examine.

Q. And how many have you accepted? A. We couldn't tell you that. There is no way of telling.

Q. One, two, five, ten; can you give us an approximate idea? A. I couldn't tell you maybe two dozen; maybe three dozen.

Q. Maybe only five? A. Oh, no; that would be too small an amount. I should say from 1946 on I must have examined at least 500 myself.

Q. And how many of those 500 did you accept? A. That is, for regular jury work.

Q. I am concerned now, Mr. Fischer, with just the special list. A. Oh, I would say I examined maybe about a hundred, and of those maybe, well not to pin me down, maybe a dozen" (fols. 131-133).

And at folios 139-140 he testified as follows:

"Q. Mr. Fischer, you know, do you not, that certain sections of the county are commonly known as colored sections where the colored population is thick and heavy? A. That's right.

Q. Does your office concentrate when looking for jurors on those sections, or does your office shy away from those sections? A. No. Only a short time ago—I guess about eight months ago—it so happened that in one of the election assembly districts which embodied quite a number of colored people, I would say that there were 400 that responded to notices that we sent out."

Fischer also testified that he was not aware of any deliberate intent to exclude negroes from service on special juries; that the drawing of the special jury panel for the instant case was supervised by a Justice of the Supreme Court; that the petitioners were represented by counsel at the drawing, and that no objection was raised to the method of drawing (136-137).

The foregoing testimony of Fischer utterly fails to establish any systematic, purposeful and deliberate exclusion of negroes from the special jury list.

The uncontradicted testimony is that no person was excluded because of race, creed or color.

The petitioners urge, "That out of 500 Negro jurors examined for jury duty approximately 12 were selected as special jurors on a special jury panel of 783 or 784."

The petitioners are in error in stating that 12 special jurors were selected out of 500 negroes examined.

The evidence on this point, though not very clear, seems to indicate that 500 jurors were examined; that 100 were examined for special jury service, and that of that number about 12 Negroes were selected (133).

The record is barren of any proof showing the population of Bronx County and what proportion of such population is colored.

Neither is there any evidence in the record to show the degree of literacy and intelligence of the Negro portion of the population, and whether or not the disparity between the number of white special jurors and Negro special jurors is attributable to an inability on the part of Negroes to qualify as special jurors.

> "Even in the Negro cases this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution. Akins v. State of Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276 * * *."

Fay v. *New York, supra*, at pages 1533-1534.

In the recent case of *Eddie* (*Buster*) *Patton, petr.* v. *State of Mississippi* (Cal. No. 122), (official citation unavailable), decided by this Court on December 8, 1947, this Court reiterated the doctrine that it is only where there is a systematic, intentional and deliberate exclusion of negroes from jury duty that there can be said to be a denial of constitutional rights.

The record in the instant case not only shows that the petitioners failed to establish their claim that there was a systematic, intentional and deliberate exclusion of negroes

from the special jury panel, but it affirmatively appears from the record that negroes, from time to time, were examined as to their qualifications for special jury service; and that a number of negroes were, in fact, selected for such service, and their names appeared on the special jury list, and were in the drum from which the jurors' names were selected. The mere fact that there were no negroes on the panel of 150 jurors drawn in the instant case is no proof that there was discrimination against negroes.

The evidence adduced upon the trial of the challenge establishes, beyond any doubt, that in the preparation of the lists of jurors, special as well as general, no distinction whatsoever was made as to race, creed or color.

Not only have the petitioners not sustained the burden of establishing their claim that there was purposeful and intentional discrimination against Negroes, but they have not offered an iota of proof to substantiate their contention.

The petitioners do not point to any evidence in the record which would justify the claim that negroes were, at any time, in the history of this State systematically, intentionally and deliberately excluded from juries.

In nearly all cases where this Court has found such discrimination, it has found it to have persisted over many years.

It has never been shown to have existed in the State of New York.

In the instant case, the testimony adduced on the hearing of the challenge does not show any discrimination of any kind.

As was said by Mr. Justice JACKSON in his opinion in *Fay* v. *New York*, *supra*, at page 1535:

> "* * * * The defendants have shown no intentional and purposeful exclusion of any class, and they have shown none that was prejudicial to them. They have had a fair trial, and no reason appears why they should escape its results."

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari to the Court of Appeals of the State of New York, and for stay of execution of judgment, should be denied.

Dated: New York, December 12, 1947.

Respectfully submitted,

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APPENDIX

Section 749-aa of the Judiciary Law of the State of New York

§ 749-aa. Special jurors in certain counties.

1. List of special jurors. The county clerk of each county of the state having a population of one million or more, and of each county of the state having a population of four hundred thousand or more, adjoining a county having a population of one million or more inhabitants, according to the last preceding federal census, shall select from the persons qualified to serve as trial jurors in such county such number of special jurors as the justices of the appellate division of the supreme court, or a majority of them of the department in which such county is situated shall, from time to time, direct. The names of the persons so selected liable to serve as special jurors shall be entered in suitable books alphabetically arranged, with their places of business and the residence of each. Such county clerk, from time to time, may cancel such selection and strike the names of such special jurors from such list and select other special jurors in their places. Persons who are selected as aforesaid by such clerk to act as special jurors shall be exempt from all other jury duty from and after the date of their selection, and they shall remain so exempt so long as they continue to be such special jurors.

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged

be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. Examination as to fitness; subpoena; punishment for disobedience. No person shall be selected as a special juror until he shall have been examined personally by the county clerk, his deputy or secretary as to his qualification and fitness to serve as a special juror. Such county clerk may issue a subpoena requiring any person within such county to attend before him, his deputy or secretary at a time specified for the purpose of testifying concerning the qualification or fitness of himself or any other person to serve as a special juror, and the propriety of the selection of such special juror. A person so subpoenaed must attend and testify accordingly. In case of his failure to attend and testify as required by such subpoena, or a refusal to be sworn, or to answer any legal or pertinent question, he shall be punished therefor by any justice of the supreme court as a contempt of court. All of the provisions of sections four hundred four through four hundred fourteen of the civil practice act, sections twenty-five and twenty-six of the civil rights law, are made applicable to the enforcement of the provisions of this sub-

tion, except that no fees are required to be paid to any rson so subpoenaed. The county clerk, in the record de by him of the jurors selected as such special jurors, all enter the age of each special juror so selected, his busi- ss or vocation, if any, the length of his residence in the te and county and, if naturalized, the date of his turalization. Such record shall be a public record and ll be open to inspection.

. Application for special jury. Whenever an issue of t has arisen in any civil or criminal action triable in a nty embraced within the provisions of this section, district attorney, or the defendant, if in a criminal ion, or either party in a civil action may apply for a cial jury to try such issue. Such application may be de at any term of the supreme court appointed to be d within the county where such issue is triable, or at term of any other court of record in which court such ue is to be tried. It must be made upon the indictment, plea thereto and an affidavit in a criminal action or the adings and affidavit in a civil action upon two days' tice to the adverse party or his attorney. Where, upon h application, it appears to the court that by reason the importance or intricacy of the case, a special jury is uired, or that the subject-matter of the indictment or issue to be tried has been so widely commented upon t the court is satisfied that an ordinary jury cannot thout delay and difficulty be obtained to try such issue, that for any other reason the due, efficient and im- rtial administration of justice in the particular case uld be advanced by the trial of such an issue by a cial jury, the court to which the motion is made may ke an order directing that such trial be had by a special y, and such trial shall be had accordingly. The order st specify the time when the drawing of such special y shall take place and the number of special jurors to then drawn, the term of the court and particular day

in the term when such special jury must attend. The day so specified for the attendance of the special jury must, except in the case of an order for additional special jurors drawn under subsection six of this section, be at least five days in addition to any Sunday, holiday or half-holiday, after the day specified for the drawing of the special jury.

5. Drawing; notification of jurors. At the time specified in the order the special jury shall be drawn at the office of the county clerk by such county clerk, or his deputy, and a judge or justice of a court of record residing in the department in which such special jury is to be drawn. A minute of the drawing must be kept by the county clerk, or his deputy, which must be entitled in the action in which the jury is to serve specifying the term of court and the particular day in the term when the special jurors so drawn must attend; and there must be entered thereon the name of each juror drawn. Such minute must be signed by the judge or justice and by the county clerk, or his deputy, present at the drawing and such minute so signed must be filed in the office of such county clerk. Such county clerk must notify each juror therein named as provided for by section six hundred twenty four of the judiciary law; except that such notice need not be served six days before the time that the special juror is required to attend. Before the day specified for the attendance of the special jurors the county clerk must file with the clerk of the trial court, part or term at which the juror is required to attend, a certified copy of the minute with a return indorsed thereon or annexed thereto specifying the manner in which each juror was notified and the time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom such service shall have been made, stating the manner, time and place of such service shall accompany such return.

6. Additional jurors; drawing. If the panel of the special jurors thus drawn shall be exhausted before a jury is completed, or if the trial court shall be of the opinion that additional special jurors will probably be needed to complete the jury, the trial court may, from time to time, direct that such additional special jurors be drawn for the trial as it may deem expedient. The order must specify the number to be drawn, the time of the drawing and the time when such additional jurors shall be required and notified to attend. Such additional drawing shall be made by the same officers authorized to draw the special jurors, either in open court in the presence of the judge or justice presiding at the trial, or at the office of the county clerk as prescribed in such order, and shall be conducted in the same manner as the original drawing and a minute thereof kept and certified as prescribed for the original drawing, and the jurors so drawn shall be summoned in the same manner as those originally drawn.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenged for actual bias, shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. Revision of list. In each county of the state to which this section applies, the names selected and composing the special jury list heretofore compiled, shall be the special jury list for such county subject to such revision thereof

by striking therefrom and adding thereto the names
such jurors as from time to time the county clerk sh
deem proper.

9. Appellate division to make rules. The justices
the appellate division of the supreme court of the depa
ment embracing the county in which such special jury li
shall be constituted shall make such rules and regulatio
not inconsistent with the provisions of this section as sh
be necessary to regulate the making of the application f
a special jury under the provisions of this section for t
drawing and attendance of such jurors and for the prop
and efficient enforcement of the provisions of this sectio

10. Violations of section or rules, penalty. Any viol
tion of this section, or of such rules and regulations pr
scribed by the appellate division of the supreme court sh
be deemed a contempt of court under section seven hu
dred fifty of the judiciary law and such rules and regul
tions may be enforced as if a violation thereof were su
a contempt as provided by section seven hundred fifty-o
of the judiciary law.

106

Testimony on Hearing of Challenge

COUNTY COURT,

BRONX COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK
against
GEORGE C. MOORE and LESTER HAUGHTON,
Defendants.

Ind. #178/1947.

107

(On indictment for Murder—1st Degree.)

New York, March 20, 1947.

Before: HON. JAMES M. BARRETT, County Judge and a Jury.

APPEARANCES:

For the People:

SAMUEL J. FOLEY, Esq., District Attorney, Bronx County, and NICHOLAS F. DELAGI, Esq., Assistant District Attorney.

For Defendant Moore: 108

JOHN F. WILKINSON, Esq., and ISIDORE EHRMAN, Esq.

For Defendant Haughton:

I. SAUL FLEISCHMAN, Esq., and HENRY F. MCDONOUGH, Esq.

109 The Court: There has just been submitted to me within the past 10 or 15 minutes a challenge on behalf of the defendant George Cornelius Moore and the defendant Lester Haughton as to the sufficiency of the panel that has been called to try this case. That is under Section 363 of the Code of Criminal Procedure. (A copy of this challenge was not served on the District Attorney until
110 after the Court received the challenge this morning.)

Now, does the District Attorney challenge the sufficiency of the facts alleged as a ground for challenge? Do you deny the sufficiency of the challenge?

Mr. Foley: Yes, sir, we do.

The Court: Under the circumstances, then, we will have to proceed to try the issue today, and it would be advisable to excuse the jurors until tomorrow morning, because it will probably take a good part of the day to get ready. Now, I think for their convenience we will adjourn until tomorrow morning. Is there any objection?

111 Mr. Wilkinson: There is no objection by the defendant Moore.

Mr. Fleischman: No objection by the defendant Haughton.

Your Honor, we want to note our exception on the record to the denial by the District Attorney.

Mr. Wilkinson: And exception on the record for the defendant Moore.

The Court: We will proceed to try the issue. All
112 jurors are excused until tomorrow morning at ten minutes to ten.

All right, gentlemen, it is up to you to proceed.

Mr. Wilkinson: In that event, sir, we would like to have the Court's permission to direct that the County Clerk be forthwith ordered to appear before the Court together with the files.

The Court: I don't know whether he is available.

Mr. Wilkinson: Well, a deputy, sir, will do, together
113 with their records that they have amassed under Section 749aa, Article 18th of the Judiciary Law.

The Court: That will take some time, now. I will take a recess at this time in order that we might get these various men. Whom else do you want to call?

Mr. Wilkinson: We want to call the County Clerk or the deputy in charge of the panels, together with the records.

The Court: Do you want the County Clerk in person?

Mr. Wilkinson: Or a deputy who would have charge of the panels, together with their records.

The Court: Whom else?

Mr. Wilkinson: That will be sufficient. 114

The Court: Just the County Clerk deputy and his records?

Mr. Wilkinson: Yes, sir.

The Court: The Court will do that.

Mr. Fleischman: If your Honor pleases, we would like those challenges marked for identification for the record.

The Court: They are filed with the Court.

Mr. Fleischman: And are they made part of the record of this proceeding? 115

The Court: They will be filed with the record in this case.

So there will be no mistake about it, I had three separate papers submitted on behalf of Lester Haughton and one paper on behalf of George Cornelius Moore.

It is understood, gentlemen, the allegations in the three papers are the same as the allegation in the one paper.

Mr. Wilkinson: I understand so; yes, sir.

The Court: They have asked for the production of the County Clerk or a deputy and his records, so we will take 116 a recess until we get those men here.

Mr. Foley: Shall I undertake to have them here?

The Court: Yes.

(After Short Recess.)

The Court: Are you ready, gentlemen?

Mr. Wilkinson: Defendant Moore is ready.

Mr. Fleischman: Defendant Haughton is ready.

The Court: You made certain requests of me before. Have you had ample opportunity to look at the records you have asked to be produced?

Mr. Wilkinson: Yes, sir.

The Court: Are both sides ready to proceed?

117 Mr. Wilkinson: Yes, sir.

The Court: I understand the inquiry now is to be directed to the intentional elimination or disqualification of women and Negroes on the special jury panel.

Mr. Wilkinson: That is correct.

118 The Court: All right; proceed.

Mr. Fleischman: Intentional or improper elimination.

The Court: Swear the County Clerk.

Michael B. McHugh, County Clerk, Bronx County, being first duly sworn, testified as follows:

By Mr. Wilkinson.

119 Q. Now, Judge McHugh, in your capacity as County Clerk of the County of Bronx, do you in your office have charge of the compiling of a list of special jurors? A. We do.

Q. You compile that list pursuant to the Judiciary Law of the State of New York? A. We do.

Q. And more specifically Section 749aa of that law, is that correct? A. Yes, sir.

Q. The list of special jurors that is compiled in your office, is that taken from a general list of jurors for this county? A. Yes.

Q. These lists, are they compiled by subordinates of yours
120 in the County Clerk's office? A. All work in the County Clerk's office is done by subordinates.

Q. So that the records and everything are compiled by others under your supervision? A. Yes, sir.

Q. They are not personally compiled by you? A. No, ir.

Mr. Wilkinson: No further questions.
Mr. Fleischman: That's all. 121
Mr. Foley: Judge, I would like to ask a question, please.

By Mr. Foley.

Q. Who is it in your office that is designated by you to ompile this list of special jurors? A. The jurors office in charge of a deputy, John J. Hanley, and under him the secretary of the office, William Fischer.
Q. And is he the subordinate who actually does the ork? A. Fischer is in charge of the actual clerical end 122 f the work under the direction of Mr. Hanley.

Mr. Foley: Thank you.
(Witness excused.)

William F. Fischer, 888 Faile Street, Bronx, New York, eing first duly sworn, testified as follows:

By Mr. Wilkinson.

Q. Mr. Fischer, where are you employed? A. Division 123 f Jurors office, County Clerk, Bronx.
Q. In that capacity do you have charge of compiling he list of special jurors? A. I supervise it; yes, sir.
Q. Will you tell us how the list of special jurors is com-iled? A. Well, under the law it is required that we have list of 800 special jurors, and we select or make up that st from jurors that are on our present list. When they me in for examination and so forth, we make up our list om that. Then when there are vacancies we send for 124

the regular jurors on the list and we examine them. If they meet with the requirements we place them on the list.

Q. What are the requirements according to your office of a special juror? A. That they not be opposed to capital punishment.

Q. Is that the only requirement? A. That's the only one. There are some other questions on the questionnaire, and with the approval of the applicant we place them on the special juror list.

125 Q. For the special jurors is there a separate application that is signed by them, or is it the same application for a trial juror? A. It is a separate application.

Q. Do you have a copy of that? A. I have. This is it (handing same to counsel).

Mr. Wilkinson: I will offer that copy in evidence.

Mr. Foley: No objection.

(Same received in evidence and marked Defendants' Exhibit 1 of this date.)

126 Q. Now, with reference to the trial jurors in Bronx County, is there a different application that is used for those jurors? A. There is, sir.

Q. Do you have one with you? A. I have. There is one form for men and one form for women (handing same to counsel).

Mr. Wilkinson: I will offer these forms in evidence separately.

Mr. Foley: No objection.

(Same received and marked Defendants' Exhibits 2 and 3 respectively of this date.)

127 Q. Now, Mr. Fischer, if a person appears at your office and applies for special jury duty, may they make an application to serve as special jurors? A. If they are not on our list, sir, they have to fill out a qualifying blank,

which is the white one if it is a male. If they meet with the requirements, then we put them on the special juror list, but he would have to be sworn in as a juror first.

Q. The only thing you are interested in when you accept him as a special juror is that he be not against capital punishment? A. Free of that; yes, sir.

Q. How many special jurors are there in the County of 128
Bronx? A. We have approximately 784 or 783.

Q. Will your records indicate how many of the 784 are Negroes? A. No, sir. There is no way of determining that. A juror is a juror, white or black, race or creed, man or woman.

Q. Will your records indicate how many of those are Negroes? A. No, sir.

Q. Will your records indicate how many of the approximately 780 are women? A. Well, if you looked over the names you could get that; yes, sir.

Q. Do you keep a card index? A. We do, sir.

Q. Do you put down the sex of the person in the card 129
index? A. Only their name.

Q. Do you put down the color of the person? A. We do not.

Q. Are you or an associate of yours the only one that determines whether a person shall become a special juror or not? A. Well, Mr. Hanley as the deputy when the requirements are met. As secretary I sign it. Then it is required of Mr. Hanley, the deputy, to sign it when he 130
looks them over and checks on it.

Q. Does he interview them personally? A. Sometimes he does; yes.

Q. Who strikes out the names from the special jurors list? A. It is an office routine, an office mechanics. If a person moves from the county it is stricken off. If a person is deceased it is stricken off.

Q. Do you keep the same names on the special juror panel from year to year? A. We do.

131 Q. And do you keep a record of their service? A. We do.

Q. And do you keep a record of their convictions? A. No, sir; that's something we wouldn't know.

By Mr. Fleischman.

Q. Mr. Fischer, of your own knowledge, you cannot then definitely state whether or not there are any Negro jurors on the special panel? A. Well, we know there are.

Q. When you say you know there are, do you know that from your records? A. Yes, sir; from examining them personally.

132 Q. How many would you say there are on the special list? A. I couldn't even give you an estimate, because there are so many of them that come in. I couldn't tell you truthfully.

Q. You mean there are so many people that come into your office? A. No; colored people that we examine.

Q. And how many have you accepted? A. We couldn't tell you that. There is no way of telling.

133 Q. One, two, five, ten; can you give us an approximate idea? A. I couldn't tell you. Maybe two dozen; maybe three dozen.

Q. Maybe only five? A. Oh, no; that would be too small an amount. I should say from 1946 on I must have examined at least 500 myself.

Q. And how many of those 500 did you accept? A. That is, for regular jury work.

Q. I am concerned now, Mr. Fischer, with just the special list. A. Oh, I would say I examined maybe about a hundred, and of those maybe, well, not to pin me down, maybe a dozen.

134 Q. How many women would you say there are on that special list of jurors? A. I couldn't be exact, but I would say possibly 50. I wouldn't know exactly. Maybe there's 30; maybe there's 40, but there's quite a few names. If you check up on them you will see them.

. Do you know how many names of Negro jurors were
he drum when this special panel was drawn? A. No,
o not. There is no way of determining that.
. Do you know if any were in the drum? A. I couldn't
you.

Mr. Fleischman: That's all.

Mr. Foley. 135

. How many names do you put in the drum, Mr.
cher, when you draw a special panel? A. Why, there
one panel out, sir, and there were 600 and some odd
when this panel of 150 was drawn.
. Did you put into the drum all of the jurors who had
been drawn previously for service on the special panel?
Correct, sir.
. And however many Negroes or women there are on 136
special panel, their names were in the drum? A. Cor-

. Were you present when the drawing was had? A.
as.
. Was that on the third day of March, 1947? A. It

. Are you aware of any deliberate intent to exclude
roes or women from service on the special panel? A.
sir.
. Was the drawing supervised as required by law by 137
stice of the Supreme Court? A. It was, sir.
. And were the defendants represented by counsel
e? A. Not all four, but I believe there were two.
. Was any objection raised to the method of drawing?
t was not, sir.

Mr. Foley: That's all.

By Mr. Wilkinson.

Q. Mr. Fischer, in the selection of jurors do you have regard to the population of the county? A. Population of the county?

138 Mr. Foley: May I interrupt and ask is counsel referring now to the general panel of jurors or to the special panel?

Mr. Wilkinson: Special panel.

A. Not necessarily.

Q. Do you or your office fix the number of women that shall serve as special jurors? A. No, sir.

139 Q. Do you fix the number of men that shall serve as special jurors? A. Only the total amount of jurors of 800 shall be on that list, whether they be men or women jurors.

Q. Does your office recognize the colored population in this county with respect to the representation upon the jury? A. Well, in getting up the list from telephone books, voting records or whatever source we may use, we couldn't tell whether they be colored or white, outside of the names.

140 Q. Mr. Fischer, you know, do you not, that certain sections of the county are commonly known as colored sections where the colored population is thick and heavy? A. That's right.

Q. Does your office concentrate when looking for jurors on those sections, or does your office shy away from those sections? A. No. Only a short time ago—I guess about eight months ago—it so happened that in one of the election assembly districts which embodied quite a number of colored people, I would say that there were 400 that responded to the notices that we sent out.

Q. Was that 400 accepted for special jury duty? A. No, sir.

141 Q. In questioning for special jurors, has your office concentrated on the colored sections? A. No, sir.

Q. Have them concentrated on other sections other than colored? A. No, sir; in general.

Q. Now, you have stated it is the practice of your office at you often go so far as to look up the telephone book? That's right.

Q. That is, in search of jurors? A. Correct.

Q. Some of those that you would get from the telephone 142
ok, would they become special jurors? A. Well, if they et with the requirements. Of course, that's quite a ad question. I couldn't say for sure.

Mr. Wilkinson: No further questions.

Mr. Fleischman: That's all, your Honor.

(Witness excused.)

Mr. Wilkinson: That's all the evidence that the defendant Moore is submitting on the challenge.

Mr. Fleischman: That's all the defendant Lester Haughton is submitting on the challenge, your Honor. 143

Mr. Wilkinson: On the basis of the foregoing evidence the defendant Moore moves to sustain the challenge and to dismiss the panel.

Mr. Fleischman: The same thing for Lester Haughton.

The Court: Motion denied. Challenge disallowed.

Mr. Wilkinson: I take exception to the Court's finding.

Mr. Fleischman: I take exception in behalf of Lester Haughton.

The Court: Is that all, gentlemen? You have had everything you want now? 144

Mr. Fleischman: That's all.

Mr. Wilkinson: That's all, sir.

The Court: All right. We will proceed tomorrow morning at ten o'clock. The case is adjourned until ten o'clock tomorrow morning.

145

New York, March 21, 1947.

(TRIAL CONTINUED.)

Appearances: As noted on title page.

The Court: Proceed. You are allowed thirty peremptory challenges. I will pick two alternate jurors in this case.

Mr. Fleischman: At this time I would like the Court to take judicial notice of the fact that there are no colored jurors on the Special Panel of 150 jurors.

The Court: The Court will take notice of it. It is
146 apparent that there are no Negro jurors present at this time.

Mr. Wilkinson: I make the same request on behalf of the defendant Moore.

The Court: Proceed.

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By GEORGE
Assistant

HERMAN J.
of C